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80-1791

No.

IN THE

Supreme Court of the United States

October Term, 1980

JAMES C. EDWARDS, Individually, and in His official capacity as Superintendent of Schools, Hendry County, Florida, *et al.*,

Petitioners,

v.

S-1, a Minor, by and through His Mother and Next Friend, P-1, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Do the Education For All Handicapped Children Act of 1975 and Section 504 of the Rehabilitation Act of 1973 prevent a public school district from expelling a handicapped child and withholding educational services during the period of expulsion for misconduct which would result in the expulsion of and the withholding of educational services from a non-handicapped child?

2. Is an expulsion of a handicapped child a change in educational placement requiring the school district to follow the change in placement procedures under the Education For All Handicapped Children Act of 1975 and Section 504 of the Rehabilitation Act of 1973 instead of the regular expulsion procedures as are followed for non-handicapped students pursuant to *Goss* v. *Lopez,* 419 US 565, 95 S.Ct. 729, 42 LED2d 725 (1975)?

3. Do the Education For All Handicapped Children Act of 1975 and Section 504 of the Rehabilitation Act of 1973 require the school district to conduct a due process hearing to determine whether or not there is an individualized educational program for a handicapped student when the student has voluntarily withdrawn from school or the student's guardian has actually signed the individualized educational program?

4. Does the Education For All Handicapped Children Act of 1975 vest state educational officials with authority to review the expulsion proceedings of local educational agencies when such authority does not exist under state law?

PARTIES

(Local Defendants): Petitioners
JAMES C. EDWARDS, individually and in his official capacity as SUPERINTENDENT OF SCHOOLS, HENDRY COUNTY, FLORIDA; and WILLIAM M. GOBER, DARRELL R. HARRIS, CHAIRMAN, TERESA M. MILLICEVIC, BEAFORD B. DAVIDSON, ABNER VANN, and RAYMOND PITTMAN, individually, and in their official capacities as members of the DISTRICT SCHOOL BOARD OF HENDRY COUNTY, FLORIDA: and JIMMY O. PHIFER and DARYLE E. CUE, individually, and in their official capacities as PRINCIPAL and ASSISTANT PRINCIPAL, respectively, of Clewiston High School in HENDRY COUNTY, FLORIDA; and KENNETH DOOLEY, individually, and in his official capacity as DIRECTOR OF INSTRUCTIONAL SERVICES, District County School Board of Hendry County, Florida.

(State Defendants): Respondents
RALPH D. TURLINGTON, individually, and in his official capacity as COMMISSIONER OF EDUCATION, STATE OF FLORIDA, DEPARTMENT OF EDUCATION; and ROBERT GRAHAM, GEORGE FIRESTONE, JIM SMITH, RALPH TURLINGTON, BILL GUNTER, GERALD LEWIS and DOYLE CONNER, individually, and in their official capacities as members of the STATE BOARD OF EDUCATION OF FLORIDA; and CAREY E. FERRELL, JR., individually, and in his official capacity as DIRECTOR, DIVISION OF PUBLIC SCHOOLS, STATE OF FLORIDA, DEPARTMENT OF EDUCATION; and DR. LANDIS STETLER, individually, and in his official capacity as CHIEF OF BUREAU OF EDUCATION FOR EXCEPTIONAL

STUDENT DIVISION OF PUBLIC SCHOOLS, STATE OF FLORIDA, DEPARTMENT OF EDUCATION.

(Plaintiffs): Respondents

S-1, a minor, by and through his mother and next friend, P-1; S-2, a minor, by and through his mother and next friend, P-2; S-3 and S-4, minors, by and through their mother and next friend, P-3; S-5 and S-6, minors, by and through their mother and next friend, P-4; S-7, a minor, by and through his mother and next friend P-5; S-8, a minor, by and through his grandmother and next friend, P-6; S-9, a minor, by and through her foster mother and next friend, P-4; individually, and on behalf of all others similarly situated.

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No.

JAMES C. EDWARDS, Individually, and
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His Mother and Next Friend, P-1, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION BELOW

The Fifth Circuit Court of Appeal issued its opinion in this case on January 26, 1981. The opinion is reported at 635 F.2d 342. There are no supplemental opinions. The opinion is reprinted at pages 1a-18a of the Appendix.

The related proceedings in the District Court of the Southern District of Florida were the subject of unreported opinions dated September 1, 1978. The opinion is reprinted at pages 19a-30a of the Appendix.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on January 26, 1981, and its mandate on February 20, 1981. Rehearing was not sought. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

I. Education For All Handicapped Children Act of 1975 (EHA), 20 U.S.C. §§ 1401(1), (8), (12), (16), (17), (18) and (19); § 1415. See Appendix pages 31a-37a.

II. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

Nondiscrimination under federal grants and programs; promulgation of rules and regulations.

No otherwise qualified handicapped individual in the Unites States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date

on which such regulation is so submitted to such committees.

As amended Pub.L. 95–602, Title I, §§ 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987.

III. Rules and Regulations, U.S. Department of Education, 45 C.F.R. parts 12/a .1, .2, .4, .5, .13, .14; 121a.340; 121a.343 through .346 and 121a.500 thru .553. These regulations have been renumbered to 34 C.F.R. part 300. See Appendix pages 37a-76a.

IV. Rules and Regulations, U.S. Department of Health and Human Resources, 45 C.F.R. Parts 84.1, .2, .3 and .4; Parts 84.34 through .36. These regulations have been renumbered to 34 C.F.R. Part 104. See Appendix pages 77a.-86a.

V. Florida Statutes 228. 041(28) 1980 Supplement

EXPULSION. – Explusion is the removal of the right and obligation of a student to attend a public school under conditions set by the school board, and for a period of time not to exceed the remainder of the term or school year and 1 additional year of attendance.

STATEMENT OF THE CASE

This suit arises out of actions of a local school system in Florida dealing with nine handicapped students within that school system. The students brought suit in the Federal District Court for the Southern District of Florida claiming that they were denied their rights under provisions of the Education for All Handicapped Children Act, 20 U.S.C. § 1401 to 1415 (hereinafter referred to as "the Handicapped Act") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (hereinafter referred to as "Section 504").

The operative facts are basically not in dispute. Seven of the Plaintiffs were expelled from school by the School Board of Hendry County, Florida. The expulsions were the result of separate individual acts of misconduct by the students. Prior to imposing the expulsions, the School Board afforded all of the students all of the procedural protections required by Florida law and *Goss* v. *Lopez*, 419 US 565, 95 S.Ct. 729, 42 LED2d 725 (1975). In accordance with Florida law, the students received no educational services during the expulsion period.

All of the expelled students are classified as handicapped and entitled to a free appropriate public education under the Handicapped Act and Section 504. The School Board did not treat the expulsions as changes in educational placements and, therefore, did not follow the change in placement procedures of the Handicapped Act and Section 504 and their implementing regulations.

Two of the students, both of whom are also classified as handicapped under the Handicapped Act and Section 504, requested due process hearings to determine whether or not they had been evaluated or whether or not they had individualized educational programs as required under the H dicapped Act and Section 504. The Superintendent de. 1 the request for the due process hearings. He pointed out that one of the students had voluntarily withdrawn from school and was no longer enrolled, and the other student's guardian had consented to the individualized educational program offered to the student. The consent had been given shortly before the request for the due process hearing to determine if there was an individualized educational program. The Superintendent offered conferences with the guardian to discuss the appropriateness of the individualized educational program.

The students brought suit seeking preliminary and permanent injunctive relief to prohibit the local school board from expelling handicapped students and denying them the due process hearings when requested. The District Court granted the request for the preliminary injunction by way of an Order and Memorandum Opinion entered on June 15, 1979. An appeal was taken to the United States Court of Appeals, Fifth Circuit. On January 26, 1981, the Fifth Circuit rendered an opinion affirming the District Court's action.

In its opinion, the Fifth Circuit addressed several issues involving discipline of handicapped students. While the Court offered guidance on procedures to be followed when dealing with the expulsion of a handicapped student, the Court's ultimate ruling is that expulsion from school is not allowed for handicapped students in the same way that it is for non-handicapped students.

The Court specifically ruled that expulsion is a proper disciplinary tool for handicapped students if proper procedures are followed and given proper circumstances. The proper circumstances would be when a determination is made by a knowledgeable group of persons that the student's misconduct bears no relationship to the student's handicapping condition. The Court also ruled that expulsion is a change in educational placement. As such, the proper procedures to follow when dealing with the misconduct of a handicapped child would be the change in educational placement procedures under the regulations of the Handicapped Act and Section 504. The due process procedures of *Goss* v. *Lopez*, supra, would not apply to the expulsion of a handicapped child.

The Fifth Circuit specifically ruled, however, that even under the proper circumstances and following the proper

procedures, the handicapped student does not lose the right to educational services during the expulsion period. Since non-handicapped students can lose the right to all educational services during an expulsion period, the ultimate result of the Fifth Circuit's decision is that there is no expulsion for handicapped children regardless of the handicapping condition and regardless of the misconduct involved.

The Fifth Circuit also ruled that the two students, who had requested due process hearings to determine whether or not they had been evaluated or whether or not they had an individualized educational program, were entitled to such hearings. This is true even when one of the students was not enrolled in the school system at the time of the request and the guardian of the other student had signed the individualized educational program shortly before requesting the due process hearing. The Court stated that parents of handicapped children have a right to an impartial due process hearing concerning any complaint relating to any matter relative to the education of a handicapped child and that there is no exception for students who have voluntarily withdrawn or have previously agreed to an educational placement.

Finally, the Fifth Circuit ruled that certain state educational officials, who were also sued as Defendants, were empowered by the Handicapped Act to intervene in the expulsion proceedings of the local school systems. The Court stated that, although under state law the state officials do not have the authority to intervene in the expulsion proceedings, the Handicapped Act has vested the state officials with such authority with respect to handicapped students.

REASONS FOR ALLOWING THE WRIT

The decision of the Fifth Circuit Court of Appeals in this case should be reviewed by this Court because it has decided an extremely important question of federal law under the Education For All Handicapped Children Act of 1975 and Section 504 of the Rehabilitation Act of 1973. The main question involves whether or not local public school systems have the ability to expel a handicapped child from school for misconduct which would otherwise justify the expulsion of a non-handicapped child. It is a question that has not been, but should be, settled by this Court because the answer to the question will have a tremendous impact upon the more than 16,000 public school districts in this nation as well as an impact upon the students served by those school districts.

Notwithstanding the Fifth Circuit's declaration that

> ". . . expulsion is still a proper disciplinary tool under the EHA and Section 504 when proper procedures are utilized and under proper circumstances . . ."

the Court actually ruled that a handicapped student cannot lose the right to educational services by way of expulsion from school. In Florida, as is probably the case in a number of states, expulsion is the loss of the right to receive educational services as a result of the student's own misconduct. Section 228.041 (26), Florida Statutes (1980 supplement) defines expulsion as follows:

> "Expulsion is the removal of the right and obligation of a student to attend a public school under conditions set by the school board for a period of time not to exceed the remainder of the term or school year and 1 additional year of attendance."

The Fifth Circuit in ruling that they

> ". . . cannot, however, authorize the complete cessation of educational services during an expulsion period . . ."

in effect is saying that any handicapped student regardless of the handicap and regardless of the misconduct will never lose the right to be provided educational services by the public school system. While the Fifth Circuit says that expulsion is in fact available, it is not available if educational services must be provided to the handicapped student during the term of an expulsion.

The Court specifies that before the handicapped child can be expelled, a determination must be made by a knowledgeable group of persons as to whether or not the misconduct bears a relationship to the handicapping condition. Presumably, if there was relationship between the misconduct and the handicap, then the student could not be expelled. If there were no such relationship, then the student could be "expelled". But if the student, notwithstanding the lack of any relationship between the misconduct and the handicap, cannot lose the right to educational services during the expulsion, then why even make the initial determination?

The Fifth Circuit has interpreted a statute prohibiting discrimination on the basis of handicap and a statute which seeks to assure that all handicapped children have available to them a free appropriate public education as statutes which grant to handicapped children immunity from expulsion for misconduct which would result in the expulsion (denial of all educational services) of non-handicapped children. The Fifth Circuit readily recognizes in its opinion that this is a case of first impression on the appellate level and that neither the acts nor their im-

plementing regulations provide any direction on the issues decided by the Court. Nevertheless, the Fifth Circuit went on to eliminate for handicapped children the time-honored disciplinary tool of expulsion from school for serious misconduct. The Court in effect sets up a dual disciplinary system depending upon whether the child is handicapped or non-handicapped.

Whereas a non-handicapped student who has committed a serious act of misconduct would be subject to the school system's disciplinary procedures consistent with the requirements of *Goss* v. *Lopez*, supra, the handicapped student guilty of the same misconduct would be dealt with under the change in educational placement procedures of the acts and regulations. The non-handicapped child would be provided with notice of the alleged misconduct and an opportunity to be heard on the charges. Following that, the child could be expelled.

On the other hand, the handicapped child would have to be reevaluated by a multi-disciplinary team to determine what the appropriate educational placement or program is for that child. After reviewing the appropriate testing and evaluation data, a determination would be made as to the appropriate placement for the child, keeping in mind that a handicapped child is entitled to an education in the least restrictive environment. If the child or guardian disagrees with the recommendation as to the appropriate placement (expulsion), the guardian can request a due process hearing to determine whether or not it is appropriate. During the pendency of these proceedings, the child cannot be removed from the current educational placement.

Under the Fifth Circuit's rationale, it will be just a matter time before two students, one handicapped and one not handicapped, jointly commit an act of serious miscon-

duct, such as selling drugs or assaulting a teacher. The parents of the students to whom the drugs were sold or the teacher assaulted will be hardpressed to understand why one of the students responsible remains in the current educational placement. The parents of the non-handicapped child who was expelled for the same misconduct are going to be hardpressed to understand why their child is not receiving any educational services when the other child guilty of the same misconduct continues to receive educational services and will never lose such services.

As pointed out above and by the Fifth Circuit, the acts and regulations do not provide any guidance with respect to what Congress intended in the area of discipline of handicapped students. But, the Fifth Circuit, by judicial fiat, has filled in the void and ruled that Congress, without ever specifically stating so, intended to interfere with the discipline procedures of the local school district and set up a dual system of discipline depending upon whether the child was handicapped or non-handicapped. It is not conceivable that Congress intended such a result, particularly in view of the fact that expulsion has probably been used since the beginning of public education as a disciplinary tool.

This Court was presented with an attack on another time-honored disciplinary tool – corporal punishment. In the case of *Ingraham* v. *Wright*, 430 US 651 at 689, 97 S.Ct. 1401, 51 LEd2d 711 at 736 (1977). The Court responded that although some elements might wish to eliminate corporal punishment as a disciplinary tool, nevertheless the policy decision to eliminate that disciplinary tool should not be made by the Court. The proper way to make such a choice would be through the

process of community debate and legislative action. This Court stated

> "We are reviewing here a legislative judgment, rooted in history and reaffirmed in the laws of many states, that corporal punishment serves important educational interest."

Such legislative debate to eliminate expulsion as a disciplinary tool for a portion of the student population did not exist anywhere in the history of the adoption of Section 504 or the Education of the Handicapped Act. Congress did not mention that it was the congressional intent to eliminate expulsion but, yet the Fifth Circuit Court of Appeals has ruled that Congress implied that was their intent without ever stating it.

The Fifth Circuit has also interpreted the Handicapped Act and Section 504 and their implementing regulations as requiring school districts to conduct due process hearings to make determinations that are absolutely senseless. In one case, the Court requires a due process hearing to determine whether or not an individualized educational program exists for a student who is not enrolled in the school. If the student is not enrolled in the school, then obviously there is no program. So, what purpose could be served by expending the public's funds to make such a useless determination? In another instance, the Fifth Circuit has required that a due process hearing be conducted to determine whether or not an individualized educational program exists on a student where the guardian had signed that individualized educational program with approval shortly before requesting the due process hearing to determine whether or not it existed. In that instance, of course the individualized educational program exists. So what purpose would be served to conduct the hearing as requested by the parent?

Surely, the acts and regulations do not require nonsensical and useless due process hearing simply because there are no exceptions under the acts and regulations relative to nonsensical and useless hearings.

In summary, this Court should accept for review the decision of the Fifth Circuit Court of Appeals since it had decided an extremely important question of federal law under the Education For All Handicapped Children Act of 1975 and Section 504 of the Rehabilitation Act of 1973. Because of the importance to the over 16,000 school districts in the United States as well as all of the students in the public school system of the question as to whether or not a certain group of the public school students are going to be immune from expulsion and because this question has not heretofore been decided by this Court, the Supreme Court should take jurisdiction to review the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

DECISION SOUGHT TO BE REVIEWED

S-1 a minor, by and through his mother and next friend, P-1 et al., Plaintiffs-Appellees,

v.

Ralph D. TURLINGTON, individually, and in his official capacity as Commissioner of Education, State of Florida, Department of Education et al., Defendants-Appellants.

No. 79-2742

United States Court of Appeals,
Fifth Circuit
Unit B

Jan. 26, 1981.

Before VANCE, HATCHETT and ANDERSON, Circuit Judges.

HATCHETT, Circuit Judge.

In this appeal, we are called upon to decide whether nine handicapped students were denied their rights under the provisions of the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401 - 1415, or section 504 of the Rehabilitation Act of 1973, codified at 29 U.S.C. § 794 and their implementing regulations. The trial court found a denial of rights and entered a preliminary injunc-

tion against the state and local officials. Defendants attack the trial court's entry of a preliminary injunction as an abuse of discretion. Because we find that the trial court did not abuse its discretion in entering the preliminary injunction we affirm.

FACTS

Plaintiffs, S-1, S-2, S-3, S-4, S-5, S-6, and S-8, were expelled from Clewiston High School, Hendry County, Florida, in the early part of the 1977-78 school year for alleged misconduct.[1] Each was expelled for the remainder of the 1977-78 school year and for the entire 1978-79 school year, the maximum time permitted by state law. All of the plaintiffs were classified as either educable mentally retarded (EMR), mildly mentally retarded, or EMR/dull normal. It is undisputed that the expelled plaintiffs were accorded the procedural protections required by *Goss* v. *Lopez*, 419 US 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). Except for S-1, they were not given, nor did they request, hearings to determine whether their misconduct was a manifestation of their handicap. Regarding S-1, the superintendent of Hendry County Schools determined that because S-1 was not classified as seriously emotionally disturbed, his misconduct, as a matter of law, could not be a manifestation of his handicap.

At all material times, plaintiffs S-7 and S-9 were not under expulsion orders. S-7 was not enrolled in high

[1]The misconduct upon which the expulsions were based ranged from masturbation and other sexual acts against fellow student to willful defiance of authority, insubordination, vandalism, and the use of profane language.

school by his own choice. In October 1978, he requested a due process hearing to determine if he had been evaluated or if he had an individualized educational program. S-9 made a similar request in October, 1978. Shortly before her request, S-9's guardian had consented to the individualized educational program being offered her during that school year. The superintendent denied both student's requests, but offered to hold conferences in order to discuss the appropriateness of their individualized educational programs.

Plaintiffs initiated this case alleging violations of their rights under the Education for all Handicapped Children Act, (EHA) 20 U.S.C. §§ 1401 - 1415, and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Plaintiffs sought preliminary and permanent injunctive relief compelling state and local officials to provide them with the educational services and procedural rights required by the EHA, section 504, and their implementing regulations.

TRIAL COURT DECISION

The trial court found that the EHA, effective in Florida on September 1, 1978, provided all handicapped children the right to a free and appropriate public education. The court further found that the expelled students were denied this right in violation of the EHA. In addition, the trial court decided that under section 504 and the EHA, no handicapped student could be expelled for misconduct related to the handicap. That in the case of S-2, S-3, S-4, S-5, S-6, and S-8, no determination was ever made of the relationship between their handicaps and their behavioral problems. With regard to S-1, the trial court found that the superintendent's determination was insufficient under section 504 and the EHA. The court reasoned that an ex-

pulsion is a change in educational placement. That under educational placement procedures of section 504 and the EHA, only a trained and specialized group could make this decision. For these reasons, the trial court concluded that the likelihood of success on the merits had been shown with respect to the expelled plaintiffs.

With regard to S-7 and S-9, the trial court stated that under 20 U.S.C. § 1415(b)(1)(E),[2] students and their parents or guardians must be provided "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to such child." That under 20 U.S.C. § 1415(b)(2),[3] "whenever such a complaint has been received, the parents or guardians shall have an opportunity for an impartial due process hearing." The trial court found that the superintendent's failure to grant S-7 and S-9 impartial due process hearings contravened the express provisions of the

---

[2]20 U.S.C. § 1415(b)(1)(E) provides:

> (b)(1) The procedures required by this section shall include, but shall not be limited to:
>
> (E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

[3]20 U.S.C. § 1415(b)(2) provides:

> (2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

EHA. The court therefore concluded that S-7 and S-9 had shown a likelihood of success on the merits of their claim.

Finally, the trial court found that the plaintiffs had suffered irreparable harm in that two years of education had been irretrievably lost. The court further determined that an injunction was necessary to ensure that plaintiffs would be provided their rights, even though the expulsions had expired at the time the injunction was entered.

STATEMENT OF ISSUES

In an appeal from an order granting preliminary relief, the applicable standard of review is whether the issuance of the injunction, in light of the applicable standard, constitutes an abuse of discretion.[4] *Doran* v. *Salem Inn, Inc.*, 422 US 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975); *Canal Authority of State of Florida,* 489 F.2d 567 (5th Cir. 1974). Therefore, in order to decide whether the trial court abused its discretion in entering the preliminary injunction, we must resolve the follosing issues: (1) whether an expulsion is a change in educational placement thereby invoking the procedural protections of the EHA and section 504; (2) whether the EHA, section 504, and their implementing regulations contemplate a dual system of

[4]Prerequisites for the granting of a preliminary injunction are: (1) substantial likelihood that plaintiff will prevail on the merits; (2) substantial threat that plaintiff will suffer irreparable injury if injuction is not granted; (3) threatened injury to plaintiff outweighing threatened harm injunction may do to defendants; and, (4) absence of disservice to the public interest if the injunction should be granted. Defendants only seriously challenge the trial court's findings regarding the first two prerequisites. Accordingly, we confine our discussion to those elements.

discipline of handicapped and non-handicapped students; (3) whether the burden of raising the question whether a student's misconduct is a manifestation of the student's handicap, is on the state and local officials or on the student; (4) whether the EHA and its implementing regulations required the local defendants to grant S-7 and S-9 due process hearings; and, (5) whether the trial judge properly entered the preliminary injunction agst the state defendants.

DISCUSSION

Section 504 of the Rehabilitation Act and the EHA have been the subject of infrequent litigation. No reported appelate cases deal with these acts and the issues presented in the instant case. Therefore, a review of these statutes and their pertinent regulations is necessary to the disposition of this controversy.

Section 504, effective in Florida four months prior to the expulsions in question, provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. . . .

Under 29 U.S.C. § 706(7)(B), a *handicapped* individual is defined as "any person who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities . . . ."

Under the EHA, 20 U.S.C. § 1412(1)[5] and (5)(B),[6] effective in Florida on September 1, 1978, a state receiving financial assistance under this Act is required to provide all *handicapped* children a free and appropriate education in the least restrictive environment. The definition of *handicapped* children under the EHA is similar to the definition under section 504.

Florida, and the Hendry County School Board, are recipients of federal funds both section 504 and the EHA. The children in this suit are clearly handicapped within the meaning of both section 504 and the EHA. The parties agree that a handicapped student may not be expelled for misconduct which results from the handicap itself. It

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[5]20 U.S.C. § 1412(1) provides:

> In order to qualify for assistance under his subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> (1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

[6]20 U.S.C. § 1412(5)(B) provides:

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> (5) The State has established . . . (B) procedures to assure that, to the maximum extend appropriate, handicapped children, including children in public or private institution or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature of severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily[.]

follows that an expulsion must be accompanied by a determination as to whether the handicapped student's misconduct bears a relationship to his handicap. From a practical standpoint, this is the only logical approach. How else would a school board know whether it is violating section 504?

Defendant local officials argue that they complied with section 504. As support for their position, they state that they determined, in the expulsion proceedings, that the plaintiffs were capable of understanding rules and regulations or right from wrong. They also assert that they found, based upon a psychological evaluation, that plaintiffs' handicaps were not behaviorial handicaps (as it would be if plaintiffs were classified as seriously emotionally disturbed), thereby precluding any relationship between the misconduct and the applicable handicap. We cannot agree that consideration of the above factors satisfies the requirement of section 504. A determination that a handicapped student knew the difference between right and wrong is not tantamount to a determination that his misconduct was or was not a manifestation of his handicap. The second prong of the school officials' argument is unacceptable. Essentially, what the school officials assert is that a handicapped student's misconduct can never be a symptom of his handicap, unless he is classified as seriously emotionally disturbed. With regard to this argument, the trial court stated:

> The defendants concede that a handicapped student cannot be expelled for misconduct which is a manifestation of the handicap itself. However, they would limit application of this principle to those students classified as "seriously emotionally disturbed." In the Court's view such a generalization is contrary to the emphasis which

> Congress has placed on individualized evaluation and consideration of the problems and needs of handicapped students.

We agree. In addition, the uncontradicted testimony elicited at the preliminary injunction hearing suggests otherwise. At the hearing, a psychologist testified that a connection between the misconduct upon which the expulsions were based and the plaintiffs' handicaps may have existed. She reasoned that "a child with low intellectual functions and perhaps the lessening of control would respond to stress or respond to a threat in the only way that they feel adequate, which may be verbal aggressive behavior." She further testified that an orthopedically handicapped child, whom she had consulted,

> [w]ould behave in an extremely aggressive way towards other children and provoke fights despite the fact that he was likely to come out very much on the short end of the stick. That this was his way of dealing with stress and dealing with a feeling of physical vulnerability. He would be both aggressive and hope that he would turn off people and as a result provoke an attack on him.

The record clearly belies the school officials' contention.

FIRST ISSUE

With regard to plaintiff S-1, the trial court found that the school officials entrusted with the expulsion decision determined at the disciplinary proceedings that S-1's misconduct was unrelated to his handicap. The trial court, however, held that this determination was made by school board officials who lacked the necessary expertise to make

such a determination. The trial court arrived at this conclusion by holding that an expulsion is a change in educational placement. Under 45 CFR § 121a.533(a)(3)[7] and 45 CFR § 84.35(c)(3),[8] evaluations and placement decisions must be made by a specialized and knowledgeable group of persons.

The trial court's finding presents the novel issue in this circuit whether an expulsion is a change in educational placement, thereby invoking the procedural protections of both the EHA and section 504 of the Rehabilitation Act. In deciding this issue, the EHA and section 504, as remedial statutes, should be broadly applied and liberally construed in favor of providing a free and appropriate education to handicapped students.

The EHA, section 504, and their implementing regulations do not provide this court any direction on this issue. We find the reasoning of the district court in *Stuart* v. *Nappi*, 443 F.Supp. 1235 (D. Conn. 1978), persuasive. In *Stuart*, a child was diagnosed as having a major learning disability caused by either a brain disfunction or a percep-

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[7]45 C.F.R. § 121a.533(a)(3) provides in pertinent part that:

> (a) In interpreting evaluation data and in making placement decisions, each public agency shall:
>
> (3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options . . .

[8]45 C.F.R. § 84.35(c)(3) provides in pertinent part that:

> (c) In interpreting evaluation data and in making placement decisions, a recipient shall (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.

tual disorder. She challenged the use of disciplinary proceedings which, if completed, would have resulted in her expulsion for participating in a schoolwide disturbance. The trial court held that the proposed expulsion constituted a change in educational placement, thus requiring the school officials to adhere to the procedural protections of the EHA. In so holding, the court stated:

> The right to an education in the least restrictive environment may be circumvented if schools are permitted to expel handicapped children [without following the procedures prescribed by the EHA] . . . . An expulsion has the effect not only of changing a student's placement, but also of restricting the availability of alternative placements. For example plaintiff's expulsion may well exclude her from a placement that is appropriate for her academic and social development. This result flies in the face of the explicit mandate of the handicapped act which requires that all placement decisions be made in conformity with a child's right to an education in the least restrictive environment. [Citation omitted.]

443 F.Supp. at 1242-43.

We agree with the district court in *Stuart,* and therefore hold that a termination of educational services, occasioned by an expulsion, is a change in educational placement, thereby invoking the procedural protections of the EHA.

The proposition that an expulsion is a change in educational placement has been cited with approval in *Sherry* v. *New York State Education Department,* 479 F.Supp. 1328 (W.D.N.Y. 1979) (legally blind and deaf student that suffered from brain damage and emotional disorder which made her self abusive suspended because of insufficient

staff to care for her), and *Doe* v. *Koger*, 480 F.Supp. 225 (N.D.Ind. 1979) (EHA case in which mildly mentally handicapped student was expelled for the remainder of school term for disciplinary reasons pursuant to the procedures provided for all Indiana public school disciplinary expulsions). As stated by the district court in *Doe* v. *Koger*, our holding that expulsion of a handicapped student constitutes a change in educational placement distinguishes the handicapped student in that, "unlike any other disruptive child, before a disruptive handicapped child can be expelled, it must be determined whether the handicap is the cause of the child's propensity to disrupt. This issue must be determined through the change of placement procedures required by the handicapped act." *Doe* v. *Koger*, 480 F.Supp. at 229.[9]

SECOND ISSUE

The school officials point out that a group of persons entrusted with the educational placement decision could never decide that expulsion is the correct placement for a

[9]This opinion does not infringe upon the traditional authority and responsibility of the local school board to ensure a safe school environment. A comment to the regulations provides: "While the placement may not be changed, this does not preclude dealing with children, who are endangering themselves or others." 45 C.F.R. § 121(a).513 (comment). Thus the local school board retains the authority to remove a handicapped child from a particular setting upon a proper finding that the child is endangering himself or others. In such case, the child would of course be remanded to the special change of placement procedures for reassingment to an appropriate placement. It is appropriate to superimpose this very limited authority, as contemplated by the above quoted comment, because nothing in the statute, the regulations, or the legislative history suggests that Congress intended to remove from local school boards – who alone are accountable to the entire school community – their long-recognized authority and responsibility to ensure a safe school environment.

handicapped student, thus insulating a handicapped student from expulsion as a disciplinary tool. They further state that Florida law does not contemplate this result because expulsion is specifically provided for under Florida law as a disciplinary tool for all students. While the trial court declined to decide the issue whether a handicapped student can ever be expelled, we cannot ignore the gray areas that may result if we do not decide this question. We therefore find that expulsion is still a proper disciplinary tool under the EHA and section 504 when proper procedures are utilized and under proper circumstances. We cannot, however, authorize the complete cessation of educational services during an expulsion period.

THIRD ISSUE

State defendants focus their attention on the fact that, with the exception of S-1, none of the expelled plaintiffs raised the argument, until eleven months after expulsion, that they could not be expelled unless the proper persons determined that their handicap did not bear a causal connection to their misconduct. By this assertion, we assume that state defendants contend that the handicapped students waived their right to this determination. The issue is therefore squarely presented whether the burden or raising the question whether a student's misconduct is a manifestation of the student's handicap is on the state and local officials or on the student. The EHA, section 504, and their implementing regulations do not prescribe who must raise this issue. In light of the remedial purposes of these statutes, we find that the burden is on the local and state defendants to make this determination. Our conclusion is buttressed by the fact that in most cases, the handicapped students and their parents lack the wherewithal

either to know or to assert their rights under the EHA and section 504.

FOURTH ISSUE

The next issue is whether the EHA and its implementing regulations required the local defendants to grant S-7 and S-9 due process hearings. School officials suggest that because S-7 and S-9 had voluntarily withdrawn from school, they were not entitled to due process hearings. They also suggest that the conference offered by the superintendent was an adequate substitute for the due process hearings. They cite 45 CFR 121a.506[10] as support for their argument. Under this regulation, the Department of Health, Education and Welfare (HEW) (now Health and Human Resources), states in a comment that mediation can be used to resolve differences between parents and agencies without the development of an adversarial relationship. The Justice Department, as amicus curiae, and

[10]The comment to 45 C.F.R. 121a.506 implementing 20 U.S.C. § 1416(b)(2) provides:

> *Comment:* Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a fre appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However mediation may not be used to deny or delay a parent's rights under this subchapter.

the trial court, point out that under 20 U.S.C. § 1415(b)(1), parents and guardians of handicapped children must have "an opportunity to present complaints with respect *to any matter* relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." The statute also states, in section 1415(b), that "whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing . . . ." No exception is made for handicapped students who voluntarily withdraw from school or previously agree to an educational placement. With regard to defendants' argument under 45 CFR § 121a506, HEW states in the same comment that mediation may not be used to deny or delay a parent's rights under this subpart. In the circumstances, the trial judge correctly found that plaintiffs S-7 and S-9 were entitled to due process hearings.

FIFTH ISSUE

State defendants advance three arguments that deserve comment. First, they assert that the trial judge erred in analyzing section 504 in light of the Supreme Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979). In that case, the issue was whether section 504, which prohibits discrimination against an otherwise qualified handicapped individual enrolled in a federally funded program, solely by reason of his handicap, forbids professional schools from imposing physical qualifications for admission to their clinical training program. The Supreme Court held that section 504 did not forbid professional schools from

imposing physical qualifications for admission. Without discussing *Southeastern* any further, it is clear that it does not apply to this case. Physical qualifications are not at issue in this case. Furthermore, we do not deal here with a professional school.

Secondly, state defendants argue that the trial court erred in imposing the EHA as a requirement at the time of the expulsions because the EHA was not effective in Florida until September 1, 1978. The trial court did not impose the EHA as a requirement at the time of the expulsion. The court found that the expelled plaintiffs became entitled to the protections of the EHA on September 1, 1978. As such, the expelled plaintiffs became entitled to a free and appropriate education in the least restrictive environment. In fact, under 20 U.S.C. § 1412(3),[11] because plaintiffs were not receiving educational services on September 1, 1978, they fell within a special class of handicapped students entitled to priority regarding the provision of a free and appropriate education. The only way in which the expulsions could have continued as of September 1, 1978, is if a qualified group of individuals determined that no relationship existed between the plaintiffs' handicap and their misconduct. Furthermore, section 504, effective at the time of the expulsions, provides protections and procedures similar to those of the EHA. *See,*

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[11]20 U.S.C. § 1413(3) provides in pertinent part that:

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> (3) The State has established priorities for providing a free appropriate public eduation to all handicapped children . . . first with respect to handicapped children who are not receiving an education[.]

North v. *District of Columbia Board of Education*, 471 F.Supp. 136 (D.D.C. 1979).

Finally, the state officials argue that the trial court improperly entered the injunction against them. They assert that they lacked the authority to intervene in the expulsion proceedings because disciplinary matters are exclusively local. While this argument may be true regarding non-handicapped students, it is inapplicable to handicapped students. Expulsion proceedings are of the type that may serve to deny an education to those entitled to it under the EHA. Under 20 U.S.C. § 1412(6), the state educational agency is:

> [R]esponsible for assuring that the requirements of this sub-chapter be carried out and that all educational programs for handicapped children within the state, including all such programs administered by any other state or local agency, will be under the general supervision of the persons responsible for educational program for handicapped children in the state educational agency and shall meet educational standards of the state educational agency.

Clearly, the state officials were empowered to intervene in the expulsion proceedings under 20 U.S.C. § 1412(6).

CONCLUSION

Accordingly, we hold that under the EHA, section 504, and their implementing regulations: (1) before a handicapped student can be expelled, a trained and knowledgeable group of persons must determine whether the student's misconduct bears a relationship to his handicapping condition; (2) that an expulsion is a change in educational

placement thereby invoking the procedural protections of the EHA and section 504; (3) that expulsion is a proper disciplinary tool under the EHA and section 504, but a complete cessation of educational services is not; (4) that S-7 and S-9 were entitled to due process hearings; and, (5) the trial judge properly entered the preliminary injunction against the state defendants. In the circumstances, the trial judge did not abuse his discretion in entering the injunction.

AFFIRMED.

MEMORANDUM OPINION DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 78-8020-Civ-CA WPB

S-1, a minor, by and through his mother and next friend, P-1, et al.,
Plaintiffs,

v.

RALPH D. TURLINGTON, individually, and in his official capacity as COMMISSIONER OF EDUCATION STATE OF FLORIDA DEPARTMENT OF EDUCATION, et al.,
Defendants.

FILED JUNE 15, 1979

Plaintiffs, S-1 through S-9, are mentally handicapped students who reside within the District School System of Hendry County, Florida. Plaintiffs have alleged violations of their rights under the Education For All Handicapped Children Act 20 U.S.C. § 1401 et seq., Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the due process and equal protection clauses of the Fourteenth Amendment. Plaintiffs seek a preliminary injunction compelling state and local officials to provide them with the educational services and procedural rights which they allege are required by the Handicapped Act and its implementing regulations.

The following findings and conclusions are made for the purpose of determining whether a preliminary injunction

should issue pursuant to Rule 65, Fed.R.Civ.P., and are not a final determination of the merits of plaintiffs' claims.

The criteria which govern the issuance of a preliminaray injunction in this circuit are well established. Plaintiffs must show (1) a substantial likelihood of success on the merits, (2) a substantial threat that plaintiffs will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to the plaintiffs outweighs the harm the injunction may do to defendants, and (4) that granting the injunction will not deserve the public interest. *Morgan v. Fletcher,* 518 F.2d 236 (5th Cir. 1975).

Plaintiffs S-1, S-2, S-3, S-4, S-5, S-6 and S-8 were each expelled from Clewiston High School in the early part of the 1977-78 school year for alleged misconduct. Each was expelled for the remainder of the 1977-78 school year and for the entire 1978-79 school year, the maximum time permitted by state law. During this time these plaintiffs have received no educational services. Plaintiffs S-7 and S-9 are not under expulsion orders but contend they are not being given a free and appropriate education, in that they have not been properly evaluated and placed. An impartial due process hearing, pursuant to 20 U.S.C. § 1415(b)(1), (2), was requested on behalf of each plaintiff and was denied.

The Handicapped Act provides for federal assistance to the states for the education of handicapped children. 20 U.S.C. §§ 1411 *et seq.* Eligibility for such assistance is conditioned upon existence of a state policy assuring all handicapped children the right to a free appropriate public education and a state plan approved by the Commissioner of Education setting forth policies and procedures designed to meet this goal. 20 U.S.C. §§ 1412, 1413. The act and its implementing regulations (codified at 45 C.F.R.

§ 121a) require, *inter alia,* that handicapped students be given a free and appropriate education in the least restrictive environment, be evaluated at least every three years to determine appropriate placement, and be provided with an individualized education program which must be reviewed annually. The act and regulations also provide procedural safeguards. 20 U.S.C. § 1415; 45 C.F.R. § 121a.500 *et seq.*

The defendants do not dispute that plaintiffs S-1, S-2, S-3, S-4, S-5, S-6 and S-8 have not received a free and appropriate education since the time of their expulsions and that they have been denied impartial due process hearings to challenge their placement. Rather, the defendants take the position that these handicapped students lost the right to a free and appropriate education through misconduct; that they receive the procedural protection required by *Goss v. Lopez,* 419 U.S. 565 (1975), in connection with their expulsions; and that they are not entitled to the protections of the Handicapped Act during the term of the expulsions. Defendants contend that disciplinary procedures are independent of and should not be limited by the procedures required by the Handicapped Act.

Defendants have conceded that a handicapped student may not be expelled for misconduct which results from the handicap itself. However, defendants argue that since these students were classified as "educable mentally retarded" (EMR) and not as "seriously emotionally disturbed" their handicap is unrelated to the misconduct and should not exempt them from disciplinary action. Plaintiffs dispute the conclusion that disciplinary problems are unrelated to their handicap, but also contend that the Handicapped Act prohibits the denial of a free and appropriate education to a handicapped student even for disciplinary reasons, irrespective of whether the student's misconduct is related to his handicap.

Plaintiffs S-7 and S-9 requested impartial due process hearings based on defendants' alleged failure to provide proper evaluations and to develop individualized educational programs. Defendants based their denial of such hearings on the grounds that a due process hearing is not designed to determine whether or not an IEP has been developed or whether or not there have been proper evaluations but is only designed to determine whether the program or results of the testing are appropriate.

The Court finds that plaintiffs have made an adequate showing of likelihood of success on the merits. As noted above, it is undisputed that the requirements of the Handicapped Act have not been met with respect to the expelled plaintiffs. The Court cannot agree with defendants' argument that disciplinary procedures are totally independent of and may supersede the rights of students under the Handicapped Act. The defendants concede that a handicapped student cannot be expelled for misconduct which is a manifestation of the handicap itself, however, they would limit application of this principle to those students classified as "seriously emotionally disturbed." In the Court's view such a generalization is contrary to the emphasis which Congress has placed on individualized evaluation and consideration of the problems and needs of handicapped students. The Court does not find it necessary to determine at this juncture whether a handicapped student may ever be expelled for misconduct unrelated to his handicap. In the case of these expelled plaintiffs no adequate determination was ever made of the relationship, *vel non,* between their handicaps and their behavioral problems. With the exception of plaintiff S-1, this issue does not appear to have ever been addressed. In the disciplinary proceedings resulting in the expulsion of S-1, a finding was made that his misconduct was unrelated to his handicap. However, this determination was made by

school board officials who do not have the expertise necessary to make such a determination.

In the only reported case dealing with the interaction between disciplinary procedures and the procedures under the Handicapped Act, the Court found expulsion to be a change in placement within the meaning of the Handicapped Act. *Stuart v. Nappi,* 443 F. Supp. 1235 (D. Conn. 1978). This Court is in agreement with that conclusion. Evaluations and placement decisions must be made by a specialized knowledgeable group of persons. 45 C.F.R. § 121a.532(3), .533(a)(3). In the view of this Court, only such a trained, specialized group is capable of making the determination of whether the student's handicap bears a casual relationship to his misconduct.

Although each of the expulsions in question occurred prior to the date the Handicapped Act became effective in Florida, the plaintiffs became entitled to its protections on September 1, 1978. In addition, Section 504 of the Rehabilitation Act of 1973 and its implementing regulations, 45 C.F.R., Part 84, provide protections and procedures similar to those of the Handicapped Act, which were in effect at the time of the expulsions. *See Howard S. v. Friendswood Independent School Dist.,* 454 F. Supp. 634 (S.D. Tex. 1978).

A likelihood of success has also been shown with respect to plaintiffs S-7 and S-9. The Handicapped Act requires that handicapped students and their parents or guardians be provided

> "an opportunity to present complaints with respect to any matter relating to the identification, evaluation or educational placement of the child, or the provision of a free appropriate education to such child."

20 U.S.C. §6 1415 (b)(1)(E). The act further provides that whenever such a complaint has been received the parents

or guardians shall have an opportunity for an impartial due process hearing. 20 U.S.C. § 1415(b)(2). These provisions are also incorporated into the regulations. *See* 45 C.F.R. § 121a.506. The complaint that plaintiffs S-7 and S-9 have not been properly evaluated and do not have individualized educational programs clearly falls within these provisions, and these plaintiffs are entitled to the requested impartial due process hearings to resolve this dispute.

Plaintiffs have suffered and continue to suffer irreparable harm each day they are deprived of a free and appropriate education. Almost two school years of education have been irretrievably lost to the expelled plaintiffs. As the Senate Committee which considered the Handicapped Act noted, the Supreme Court established the principle in *Brown v. Board of Education,* 347 U.S. 483 (1954), that

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

S.Rep.No. 94-168, 94th Cong., 1st Sess. 6 (1975); 1975 U.S. Code Cong. & Ad. News, 1425, 1430. The committee further recognized that

> "With proper education services many [handicapped persons] would be able to become productive citizens, contributing to society instead of being forced to remain burdens."

Id. at 1433.

Defendants argue that in light of the fact that the expulsions end with the 1978-79 school year (which ended between the date of the hearing on this motion and the entry of this opinion), the plaintiffs will not suffer irreparable

harm, and an injunction is unnecessary because all the rights to which plaintiffs are entitled will now be provided. In view of the defendants' past refusal to provide plaintiffs with the rights to which they are entitled under the Handicapped Act, in particular with respect to the two plaintiffs who were not under expulsion orders, the Court finds that a preliminary injunction is necessary to insure that plaintiffs will receive their educational and procedural rights under the act during the pendency of this litigation.

The balance of harm tips decidedly in favor of the plaintiffs. The expulsion period has expired and all of the named plaintiffs are now indisputably entitled to a free and appropriate education in accordance with the provisions of the Handicapped Act. The entry of a preliminary injunction will only require the defendants to fulfill their legal obligations mandated by statute. The burdens placed on defendants are those which Congress has placed and which the state has agreed to accept as a condition to obtaining federal funding.

The public interest will also be served by entry of a preliminary injunction. Congress has found that the proper education of handicapped children will be of substantial long range benefit to society:

> "The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.

There is no pride in being forced to receive economic assistance. Not only does this have negative effects upon the handicapped person, but it has far-reaching effects for such person's family.

Providing educational services will ensure against persons needlessly being forced into institutional settings. One need only look at public residential institutions to find thousands of persons whose families are no longer able to care for them and who themselves have received no educational services. Billions of dollars are expended each year to maintain persons in these subhuman conditions.

This Nation has long embraced a philosophy that the right to a free appropriate public education is basic to equal opportunity and is vital to secure the future and the prosperity of our people. It is contradictory to that philosophy when that right is not assured equally to all groups of people within the Nation. Certainly the failure to provide a right to education to handicapped children cannot be allowed to continue."

S. Rep. No. 94-168, 94th Cong., 1st Session 9; 1975 U.S. Code Cong. & Ad. News, 1425, 1433.

Although plaintiffs seek relief on behalf of all similarly situated handicapped students within the state, no class has yet been certified. The evidence presented by the plaintiffs failed to show that any handicapped students outside Hendry County or any other handicapped student within Hendry County have been expelled or otherwise deprived of a free and appropriate education. Therefore, at this

time the Court finds that preliminary injunctive relief should be limited to the named plaintiffs.

The Court finds that the preliminary injunction should extend to defendant state officials as well as to local officials. The Handicapped Act imposes on the state educational agency ultimate responsibility for assuring that the requirements of the act are carried out. 20 U.S.C. § 1412(6). State officials have refused to intercede based on their position that the Department of Education lacks authority to intervene in disciplinary matters which are under the authority of local school boards. *See Sweet v. Childs,* 507 F.2d 675 (5th Cir. 1975). In light of this Court's finding that disciplinary proceeding do not supersede the plaintiffs rights under the Handicapped Act, the state officials' refusal to fulfil their supervisory responsibilities under the act is unjustified. State officials' contention that a mandatory injunction against them is barred by the Eleventh Amendment, in reliance on *Alabama v. Pugh,* 438 U.S. 781 (1978), is inapposite. Plaintiffs have not sued the State of Florida or its agencies; they have sued the various state officials in their individual and official capacities.

The plaintiffs had also contended that defendants have denied them copies of educational records in violation of 45 C.F.R. § 121a.562(b)(2). At the hearing on this motion the parties stipulated that plaintiffs may use their own copying machine to copy needed records provided that the copying is done at a reasonably convenient time and that records are not damaged by the copying machine. Therefore, the Court finds it unnecessary to address this issue.

Based upon the foregoing findings and conclusions, the Court finds that preliminary injunction entered simultaneously herewith should issue.

ENTERED at Miami, Florida, this 15th day of June, 1979.

/s/ Clyde Atkins
Chief United States District Judge

PRELIMINARY INJUNCTION

THIS CAUSE having come before the Court for hearing on motion of plaintiffs for preliminary injunction and the Court having considered the evidence and memoranda presented by the parties and being otherwise duly advised, and having determined that a preliminary injunction should issue based upon the findings and conclusions set forth in the memorandum opinion entered herewith, it is

ORDERED AND ADJUDGED as follows:

1. Defendants, James C. Edwards, Superintendent of Hendry County Schools, and William G. Gober, Darrell R. Harris, Teresa M. Milicenvic, Kenneth Dooley, Beaford E. Davidson and Raymond Pittman, members of the School Board of Hendry County;, shall:

(a) immediately take affirmative steps to insure that plaintiffs S-1, S-2, S-3, S-4, S-5, S-6 and S-8 are placed in a program in the District School System of Hendry County, Florida, wherein they will be provided with a free and appropriate education in the least restrictive environment, in accordance with the requirements of the Education For All Handicapped Children Act, 20 U.S.C. § 1401 et seq., and its implementing regulations, 45 C.F.R. Part 121a.;

(b) immediately insure that a review of the evaluations of each of the named plaintiffs is conducted to determine whether they have properly evaluated in accordance with 45 C.F.R. §§ 121a.530-121a.534, and perform such reevaluations as may be required by 45 C.F.R. § 121a,534;

(c) immediately insure that a review of the educational placement of each named plaintiff is conducted in light of the required evaluations and any independent educational evaluations which plaintiffs have obtained as provided in 45 C.F.R. § 121a.503, and make appropriate placements in accordance with 45 C.F.R. § 121a.533;

(d) immediately take all necessary steps to insure that an individualized education program for each named plaintiff is developed and implemented in accordance with 45 C.F.R. §§ 121a.341-121a.349.

Defendants, Ralph D. Turlington, Bill Gunter, George Firestone, Jim Smith, Gerald Lewis, Doyle Conner, members of the State of Florida Board of Education, Carey E. Ferrell, Jr. and Landis Stetler, members of the State Department of Education, shall insure that local school officials of Hendry County are complying with the terms of this preliminary injunction and are providing plaintiffs with all the rights to which they are entitled under the Education For All Handicapped Children Act, 20 U.S.C. § 1401 et. seq. and its implementing regulations, 45 C.F.R. Part 121a.

DONE AND ORDERED in Chambers at Miami, Florida, this 15th day of June, 1979, at 1:15 p.m.

Clyde Atkins

CHIEF UNITED STATES DISTRICT JUDGE

EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975

Education of the Handicapped
20 U.S.C. §§1401-1461

[P.L. 91-230, April 13, 1970, 84 Stat. 121; as amended by P.L. 93-380, August 21, 1974, 88 Stat. 580, by P.L. 94-142, November 29, 1975, 89 Stat. 773, and by Pub.L. 95-561, November 1, 1978, 92 Stat. 2364.]

SUBCHAPTER I – GENERAL PROVISIONS

§ 1401. Definitions

As used in this chapter –

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

* * *

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

* * *

(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

* * *

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate pre-school, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child

developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

* * *

§ 1415. Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) the procedures required by this section shall include, but shall not be limited to –

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit —

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the

child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediary educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decision (which findings and decisions shall also be transmitted to the ad-

visory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to

a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

Pub.L. 91-230, Title VI, § 615, as added Pub. L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 788.

Rules and Regulations U.S. Department of Education
45 CFR 121a.1 et seq.
Renumbered to 34 C.F.R. Part 300 et seq.

Subpart A – General

PURPOSE APPLICABILITY, AND GENERAL PROVISIONS REGULATIONS

Reg. 121a.1 Purpose.

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs.

(b) To insure that the rights of handicapped children and their parents are protected.

(c) To assist States and localities to provide for the education of all handicapped children, and

(d) To assess and insure the effectiveness of efforts to educate those children.

(20 U.S.C. 1401 Note)

Reg. 121a.2 Applicability to State, local, and private agencies.

(a) *States.* This part applies to each State which receives payment under Part B of the Education of the Handicapped Act.

(b) *Public agencies within the State.* The annual program plan is submitted by the State educational agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include: (1) The State educational agency, (2) local educational agencies and intermediate educational units, (3) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and (4) State correctional facilities.

(c) *Private schools and facilities.* Each public agency in the State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

(See § 121a.400-121a.403)
(20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B))

Comment. The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

Reg. 121a.4 Free appropriate public education.

As used in this part, the term "free appropriate public education" means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge.

(b) Meet the standards of the State educational agency, including the requirements of this part,

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under §§ 121a.340-121a.349 of Subpart C.

(20 U.S.C. 1401(18))

Reg. 121a.5 Handicapped children.

(a) As used in this part, the term "handicapped children" means those children evaluated in accordance with §§ 121a.530-121a.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

(2) "Deaf-blind" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for deaf or blind children.

(3) "Hard of Hearing" means a hearing impairment, whether permanent or fluctuating, which adversely affect a child's educational performance but which is not included under the definition of "deaf" in this section.

(4) "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

(5) "Multihandicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.

(6) "Orthopedically impaired" means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g. poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

(7) "Other health impaired" means

(i) having an autistic condition which is manifested by severe communication and other developmental and educational problems; or

(ii) having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning,

leukemia, or diabetes, which adversely affects a child's educational performance.

(8) "Seriously emotionally disturbed" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not

include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(10) "Speech impaired" means a communication disorder such as stuttering, impaired articulation, a language impairment, or a voice impairment, which adversely affect a child's educational performance.

(11) "Visually handicapped" means a visual impairment which, even with correction, adversely affects a child's educational performance. The terms includes both partially seeing and blind children.

(20 U.S.C. 1401(1), (15))

[Subparagraph (b)(9) amended in 42 Fed. Reg. 65083 (Dec. 29, 1977).]

[Subparagraph (b)(7) and (b)(8) amended in 46 Fed. Reg. 3865 (Jan. 16, 1981).]

* * *

Reg. 121a.13 Related services.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes:

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lipreading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss;

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services.

(5) "Occupational therapy" includes:

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means service provided by a qualified physical therapist.

(8) "Psychological Services" include:

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) "Recreation" includes:

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "School health services" means services provided by a qualified school nurse or other qualified person.

(11) "Social work services in schools" include:

(i) Preparing a social or developmental history on a handicapped child;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affects the child's adjustments in school; and

(iv) Mobilizing school and community resources to enable the child to receive maximum benefit from his or her educational program.

(12) "Speech pathology" includes:

(i) Identification of children with speech or language disorders;

(ii) Diagnosis and appraisal of specific speech or language disorders;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech of language disorders;

(iv) Provisions of speech and language services for the habilitation or prevention of communicative disorders; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language disorders.

(13) "Transportation" includes:

(i) Travel to and from school and between schools,

(ii) Travel in and around school buildings, and

(iii) Specialized equipment (such a special or adapted buses, lifts, and ramps), if required to provide special transportation for a handicapped child.

(20 U.S.C. 1401(17))

Comment. With respect to related services, the Senate Report states:

The Committee bill provides a definition of "related services," making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of servies to minimize the effects of such conditions.

(Senate Report No. 94-168, p. 12 (1975))

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education.

There are certain kinds of service which might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors; and psychological testing might be done by qualified psychological examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administrative and supervisory activities that

are necessary for program planning, management, and evaluation.

Reg. 121a.14 Special Education.

(a)(1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered "special education" rather than a "related service" under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.

(b) The terms in this definition are defined as follows:

(1) "At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees which are normally charged to nonhandicapped students or their parents as a part of the regular education program.

(2) "Physical education" is defined as follows:

(i) The term means the development of:

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adapted physical education, movement education, and motor development.

(20 U.S.C. 1401(16))

(3) "Vocational education" means organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(20 U.S.C. 1401(16))

Comment. (1) The definition of "special education" is a particularly important one under these regulations, since a child is not handicapped unless he or she needs special education. (See the definition of "handicapped children" in section 121a.5.) The definition of "related services" (section 121a.13) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no "related services," and the child (because not "handicapped") is not covered under the Act.

(2) The above definition of vocational education is taken from the Vocational Education Act of 1963, as amended by Pub. L. 94-482. Under that Act, "vocational education" includes industrial arts and consumer and homemaking education programs.

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Subpart C — Services

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INDIVIDUALIZED EDUCATION PROGRAMS

Reg. 121a.340 Definition.

As used in this part, the term "individualized education program" means a written statement for a handicapped child that is developed and implemented in accordance with Regs. 121a.341-121a.349.
(20 U.S.C. 1401(19))

* * *

Reg. 121a.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

(b) *Handicapped children currently served.* If the public agency has determined that a handicapped child will receive special education during school year 1977-1978, a meeting must be held early enough to insure that an individualized education program is developed by October 1, 1977.

(c) *Other handicapped children.* For a handicapped child who is not included under paragraph (b) of this section, a meeting must be held within thirty calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

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(20 U.S.C. 1412(2)(B), (4), (6); 1414(a)(5))

Comment. The dates on which agencies must have individualized education programs (IEPs) in effect are specified in Reg. 121a.342 (October 1, 1977, and the beginning of each school year thereafter). However, except for new handicapped children (i.e., those evaluated and determined to need special education after October 1, 1977), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect by the dates in Reg. 121a.342, agencies could hold meetings at the end of the school year or during the summer preceding those dates. In meeting the October 1, 1977 timeline, meetings could be conducted up through the October 1 date. Thereafter, meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review, and if appropriate revise, each child's IEP. The timing of those meetings could be on the anniversary date of the last IEP meeting on the child, but this is left to the discretion of the agency.

Reg. 121a.344 Participants in meetings.

(a) *General.* The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to Reg. 121a.345.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(20 U.S.C. 1401(19); 1412(2)(B), (4), (6); 1414(a)(5))

Comment. 1. In deciding which teacher will participate in meetings on a child's individualized education program, the agency may wish to consider the following possibilities:

(a) For a handicapped child who is receiving special education, the "teacher" could be the child's special education teacher. If the child's handicap is a speech impairment, the "teacher" could be the speech-language pathologist.

(b) For a handicapped child who is being considered for placement in special education, the "teacher" could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

2. Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

3. For a child whose primary handicap is a speech impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

Reg. 121a.345 Parent participation.

(a) Each public agency shall take steps to insure that one or both of the parents of handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency must have a record of its attempts to arrange a mutually agreed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the individualized education program.

(20 U.S.C. 1401(19); 1412(B), (4), (6); 1414(a)(5))

Comment. The notice in paragraph (a) could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c), the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

Reg. 121a.346 Content of individualized education program.

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(20 U.S.C. 1401(19); 1412(2)(B), (4), (6); 1414(a)(5); Senate Report No. 94-168, p. 11 (1975))

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Subpart E — Procedural Safeguards

DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

Reg. 121a.500 Definitions of "consent," "evaluation," and "personally identifiable."

As used in this part: "Consent" means that: (a) The parents has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

"Evaluation" means procedures used in accordance with Regs. 121a.530-121a.534 to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

"Personally identifiable" means that information includes:

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number; or

(d) A list of personal characteristics or other information which would make it possible to identify the child with reasonable certainty.

(20) U.S.C. 1415, 1417(c))

Reg. 121a.501 General responsibility of public agencies.

Each State educational agency shall insure that each public agency establishes and implements procedural safeguards which meet the requirements of Regs. 121a.500-121a.514.

(20 U.S.C. 1415(a))

Reg. 121a.502 Opportunity to examine records.

The parents of a handicapped child shall be afforded in accordance with the procedures in Regs. 12a.562-121a.569 an opportunity to inspect and review all education records with respect to:

(a) The identification, evaluation, and educational placement of the child, and

(b) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(A))

Reg. 121a.503 Independent educational evaluation.

(a) *General.* (1) The parents of a handicapped child have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or insures that the evaluation is otherwise provided at no cost to the parent, consistent with Reg. 121a.301 of Subpart C.

(b) *Parent right to evaluation at public expense.* A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under Reg. 121a.506 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) *Parent initiated evaluations.* If the parent obtains an independent educational evaluation at private expense, the results of the evaluation;

(1) Must be considered by the public agency in any decision made with respect to the provision of a free appropriate public education to the child, and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

(20 U.S.C. 1415(b)(1)(A))

Reg. 121a.504 Prior notice; parent consent.

(a) *Notice.* Written notice which meets the requirements under Reg. 121a.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provisions of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

(b) *Consent.* (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parents or child.

(c) *Procedures where parent refuses consent.* (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2)(i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in Regs. 121a.506-121a.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under Regs. 121a.510-121a.513.

(20 U.S.C. 1415(b)(1)(C), (D))

Comment. 1. Any changes in a child's special education program, after the initial placement, are not subject to parental consent under Part B, but are subject to the prior notice requirement in paragraph (a) and the individualized education program requirements in Subpart C.

2. Paragraph (c) means that where State law requires parental consent before evaluation or before special education and related services are initially provided, and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures under this subpart to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

Reg. 121a.505 Content of notice.

(a) The notice under Reg. 121a.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

(b) The notice must be:

(1) Written in language understandable to the general public, and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to insure:

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice, and

(3) That there is written evidence that the requirements in paragraph (c) (1) and (2) of this section have been met.

(20 U.S.C. 1415(b)(1)(D))

Reg. 121a.506 Impartial due process hearing.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in Reg. 121a.504(a)(1) and (2).

(b) The hearing must be conducted by the State educational agency or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the State educational agency.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if:

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(20 U.S.C. 1416(b)(2))

Comment. Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes

concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under this subpart.

Reg. 121a.507 Impartial hearing officer.

(a) A hearing may not be conducted:

(1) By a person who is an employee of a public agency which is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(20 U.S.C. 1414(b)(2))

Reg. 121a.508 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by in-

dividuals with special knowledge or training with respect to the problems of handicapped children;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing.

(4) Obtain a written or electronic verbatim record of the hearing;

(5) Obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the State advisory panel established under Subpart F).

(b) Parents involved in hearings must be given the right to:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

(20 U.S.C. 1415(d))

Reg. 121.509 Hearing decision; appeal.

A decision made in a hearing conducted under this subpart is final, unless a party to the hearing appeals the decision under Reg. 121a.510 or 121a.511.

Reg. 121a.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

(b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record;

(2) Insure that the procedures at the hearing were consistent with the requirements of due process;

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in Reg. 121a.508 apply;

(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(5) Make an independent decision on completion of the review; and

(6) Give a copy of written findings and the decision to the parties.

(c) The decision made by the reviewing official is final, unless a party brings a civil action under Reg. 121a.512.

(20 U.S.C. 1415(c), (d); H.Rep. No. 94-664, at p. 49 (1975))

Comment. 1. The State educational agency may conduct its review either directly or through another State agency acting on its behalf. However, the State educational agency remains responsible for the final decision on review.

2. All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in Reg. 121a.508, relating to hearings, also apply.

Reg. 121a.511 Civil action.

Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under Reg. 121a.510 of this subpart, and any party aggrieved by the decision of a reviewing officer under Reg. 121a.510 has the right to bring a civil action under Section 615(e)(2) of the Act.

(20 U.S.C. 1415)

Reg. 121a.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing;

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

(20 U.S.C. 1415)

Reg. 121a.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

(20 U.S.C. 1415(e)(3))

Comment. Reg. 121a.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

Reg. 121a.514 Surrogate parents.

(a) *General.* Each public agency shall insure that the rights of a child are protected when:

(1) No parent (as defined in Reg. 121a.10) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child

needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates.* (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall insure that a person selected as a surrogate:

(i) Has no interest that conflicts with the interest of the child he or she represents; and

(ii) Has knowledge and skills, that insure adequate representation of the child.

(d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraph (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as surrogate parent.

(e) *Responsibilities.* The surrogate parent may represent the child in all matters relating to:

(1) The identification, evaluation, and educational placement of the child, and

(2) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(B))

* * *

PROTECTION IN EVALUATION PROCEDURES

Reg. 121a.530 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of Regs. 121a.530-121a.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory.

(20 U.S.C. 1412(5)(C))

Reg. 121a.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a handicapped child in a special educational program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of Reg. 121a.532.

(20 U.S.C. 1412(5)(C))

Reg. 121a.532 Evaluation procedures.

State and local agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so:

(2) Have been validated for the specific purpose for which they are used; and

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producers;

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining as an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(20 U.S.C. 1412(5)(C))

Comment. Children who have a speech impairment as their primary handicap may not need a complete battery

of assessments (*e.g.*, psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for additional assessments needed to make an appropriate placement decision.

Reg. 121a.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the valuation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in Regs. 121a.550-121a.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with Regs. 121a.340-121a.349 of Subpart C.

(20 U.S.C. 1412(5)(C); 1414(a)(5))

Comment. Paragraph (a)(1) includes a list of examples of sources that may be used by a public agency in making

placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to insure that more than one source is used in interpreting evaluation data and in making placement decisions. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other handicapped children, such as a child who has a severe articulation disorder as his primary handicap. For such a child, the speech-language pathologist, in complying with the multisource requirement, might use (1) a standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

Reg. 121a.534 Reevaluation.

Each State and local educational agency shall insure:

(a) That each handicapped child's individualized education program is reviewed in accordance with Regs. 121a.340-121a.349 of Subpart C, and

(b) That an evaluation of the child, based on procedures which meet the requirements under Reg. 121a.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.
(20 U.S.C. 1412(5)(c))

* * *

ADDITIONAL PROCEDURES FOR EVALUATING SPECIFIC LEARING DISABILITIES

Reg. 121a.540 Additional team members.

In evaluating a child suspected of having a specific learning disability, in addition to the requirements of § 121a.532, each public agency shall include on the multidisciplinary evaluation team:

(a)(1) The child's regular teacher; or

(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified by the State educational agency to teach a child of his or her age; and

(b) At least one person qualified to conduct individual diagnostic examination of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

(20 U.S.C. 1411 note.)

[Adopted in 43 Fed. Reg. 65083 (Dec. 298, 1977).]

Reg. 121a.541 Criteria for determining the existence of a specific learning disability.

(a) A team may determine that a child has a specific learning disability if:

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, when provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas;

(i) Oral expression;

(ii) Listening comprehension;

(iii) Written expression

(iv) Basic reading skill;

(v) Reading comprehension;

(vi) Mathematics calculation; or

(vii) Mathematic reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of:

(1) A visual, hearing, or motor handicap;

(2) Mental retardation;

(3) Emotional disturbance; or

(4) Environmental, cultural or economic disadvantage.

(20 U.S.C. 1411 note.)

[Adopted in 43 Fed. Reg. 65083 (Dec. 29, 1977).]

Reg. 121a.542 Observation.

(a) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting.

(b) In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.

(20 U.S.C. 1411 note.)

[Adopted in 43 Fed. Reg. 65083 (Dec. 29, 1977).]

Reg. 121a.543 Written report.

(a) The team shall prepare a written report of the results of the evaluation.

(b) The report must include a statement of:

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination;

(3) The relevant behavior noted during the observation of the child;

(4) The relationship of that behavior to the child's academic functioning;

(5) The educationally relevant medical findings, if any;

(6) Whether there is a severe discrepancy between achievement and ability which is not correctable without special education and related services; and

(7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(c) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions. (20 U.S.C. 1411 note.)

[Adopted in 43 Fed. Reg. 65083 (Dec. 29, 1977).]

* * *

LEAST RESTRICTIVE ENVIRONMENT

Reg. 121a.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of Regs. 121a.550-121a.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapcapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate schooling or other removal of handicapped children from the regular educa-

tional environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(20 U.S.C. 1412(5)(B); 1414(a)(1)(C)(iv))

Reg. 121a.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under Reg. 121a.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(20 U.S.C. 1412(5)(B))

Reg. 121a.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement:

(1) Is determined at least annually.

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under Reg. 121a.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs. (20 U.S.C. 1412(5)(B))

Comment. Reg. 121a.552 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84 – Appendix, Paragraph 24) includes several points regarding educational placements of handicapped children which are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her need * * *."

2. With respect to placing a handicapped child in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this fact into account in making placement decisions. The parents' right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subject.

Reg. 121a.553 Non-academic settings.

In providing or arranging for the provision of non-academic and extra-curricular services and activities, including meals, recess periods, and the services and activities set forth in Reg. 121a.306 of Subpart C, each public agency shall insure that each handicapped child participates with non-handicapped children in those services and activities to the maximum extent appropriate to the needs of that child.
(20 U.S.C. 1412(5)(B))

Comment. Reg. 121a.553 is taken from a new requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[A new paragraph] specifies that handicapped children must also be provided non-academic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children." (45 CFR Part 84 — Appendix, Paragraph 24.)

Rule and Regulations, U.S. Department of Health and Human Resources
45 C.F.R. Part 84.1 et seq., Renumbered to 34 C.F.R. Part 104 et seq.

Subpart A — General Provisions

§ 84.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 84.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Health, Education, and Welfare and to each program or activity that receives or benefits from such assistance.

§84.3 Definitions.

As used in this part, the term:

(a) "The Act" means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

(b) "Section 504" means section 504 of the Act.

(c) "Education of the Handicapped Act" means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94-142, 20 U.S.C. 1401 et seq.

(d) "Department" means the Department of Health, Education, and Welfare.

(e) "Director" means the Director of the Office for Civil Rights of the Department.

(f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) "Applicant for assistance" means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) "Handicapped person." (1) "Handicapped persons" means any person who (i) has a physical or mental impair-

ment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems; neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular, reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning difficulties.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairments; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person

who, with reasonable accomodation, can perform the essential functions of the job in question;

(2) With respect to public preschool elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons or (iii) to whom a state is required to provide a free appropriate public education under § 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) "Handicap" means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

§ 84.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap;

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level

of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

* * *

§ 84.34 Educational setting.

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 84.37 (a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section, operates a facility that

is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

§ 84.35 Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure,

rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with § 84.34.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

§ 84.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, and impartial hearing with opportunity for par-

ticipation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

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Nos. 80-1770 & 80-1791

IN THE

Supreme Court of the United States

October Term, 1980

RALPH D. TURLINGTON, Commissioner of Education, State of Florida, *et al.*,

Petitioners,

v.

S-1, a Minor, by and through His Mother and Next Friend, P-1, *et al.*,

Respondents.

JAMES C. EDWARDS, Individually, and in His Official capacity as Superintendent of Schools, Hendry County, Florida, *et al.*,

Petitioners,

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S-1, a Minor, by and through His Mother and Next Friend, P-1, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS CASE No. 80-1791

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QUESTION PRESENTED

1. Has the case become moot as the result of the Preliminary Injunction having been fully and irrevocably carried out?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS CASE No. 80-1791

THE CASE IS NOT MOOT

The Court has directed all counsel to file supplemental briefs addressing the issue of whether or not the case has become moot. It is clear from the law, as enunciated by this Court, in *University of Texas v. Camenisch,*

____US____, 101 S.Ct. 1830, 68 L.Ed.2d 175 (April, 1981), as well as the facts of this case that the case is not moot and certiorari should be granted.

In *University of Texas v. Camenisch*, this Court was asked to review the decision of the Fifth Circuit Court of Appeals holding that the District Court did not abuse its discretion in granting a preliminary injuction against the University of Texas. The preliminary injunction, interpreting Section 504 of the Rehabilitation Act of 1973, 29 USC 794 (Supp. III 1979), required that the University pay for a sign language interpreter for Camenisch, a deaf graduate student.

The Fifth Circuit had rejected an argument that the case was moot because Camenisch had already graduated and he had received the relief he had sought. The preliminary injunction was therefore no longer in effect. The Court reasoned that there was, nevertheless, still a justiciable issue as to which party must pay for the interpreter and the case was not moot, particularly since Camenisch had to post bond that could be used to repay if he lost the Appeal. *Camenisch v. University of Texas*, 616 F2d 127 (1980).

This Court reversed, pointing out that the only issue on appeal was whether or not there had been an abuse of discretion in issuing the preliminary injunction. Since the terms of the injunction had been fully and irrevocably carried out, then that question was moot. The question of which party pays for the sign language interpreter should be decided in a full trial on the merits in the District Court, not on appeal.

But in the present case, the preliminary injunction has not been fully and irrevocably carried out. It remains in full force and effect. It was not an injunction that was ad-

dressed to stopping the original expulsions before they had already run their course. If it had been, then there might be some question as to whether or not the injunction had expired by its own terms when the expulsions would have ended anyway without the injunction.

To the contrary, this preliminary injunction did not address past expulsions, but addressed how the school district would handle future expulsions with respect to these plaintiffs. While the preliminary injunction does not specifically address expulsions, it does require that the plaintiffs be provided with all the rights that they are entitled to under the Education for All Handicapped Children Act. These rights would be as interpreted by the District Court and as expanded by the Fifth Circuit. Clearly, one aspect of the plaintiffs' rights under this act as interpreted by the Fifth Circuit is that the plaintiffs can never lose the right to educational services no matter what their misconduct and no matter what their handicap. No matter what the circumstances, the Fifth Circuit requires that a handicapped student never lose the right to educational services even during the term of an "expulsion".

The preliminary injunction issued by the District Court continues to operate to prevent the local official defendants from utilizing the disciplinary tool of expulsion as defined in Section 228.041 (26), Fla. Stat. (1980 Supp.) with respect to the individual plaintiffs. The injunction continues because all but one of the plaintiffs are still in school or entitled to be in school.

The local official defendants have maintained at every stage of this litigation, and still maintain that they have the right under the Education for All Handicapped Children Act of 1975 and Section 504 of the Rehabilitation Act of 1973 to expel plaintiffs or any other handicapped students

for misconduct which would justify the expulsion of non-handicapped students. The local official defendants have at all times maintained and still maintain that expulsion would mean the total loss of the right and obligation for a student to attend public schools and have educational services provided. This would be the same for non-handicapped as well as handicapped students. But for the continuing effect of the preliminary injunction, the local official defendants would subject plaintiffs to the same disciplinary procedures as all other students. *Cf. Defunis v. Odegaard*, 416 US 312 (1974).

Not only is this case not moot with respect to the plaintiffs still in school or entitled to be in school, but this injunction, as expanded by the opinion of the Fifth Circuit, operates in reality to enjoin the local school district from expelling any handicapped child within the school district for misconduct which would justify the expulsion of a non-handicapped child. Local school officials would subject themselves to individual liability if they treated a handicapped child the same way they treated a non-handicapped child in expulsion procedures so long as the opinion of the Fifth Circuit remains undisturbed. See, *Wood v. Strickland*, 420 US 308 (1975).

Additionally, since the Fifth Circuit ruled that the state defendants had an obligation to enforce the rights as interpreted by the Court, then the decision has the collateral effect of prohibiting expulsion for any handicapped student in the State of Florida. Indeed the Fifth Circuit's opinion would have a continuing collateral effect not only throughout its jurisdiction, but throughout the nation. So long as that decision stands, educators would be ill-advised to attempt to subject handicapped students to the same disciplinary procedures as all other students regardless of the handicapping condition and regardless

of the misconduct involved. This Court recognises that such collateral effects should he considered in determining whether a controversy is moot. See, *Southern Pacific Co., v. ICC*, 219 US 433 (1911).

It is clear, therefore, that the preliminary injunction in the present case has not been fully and irrevocably carried out, but rather is still in full force and effect and will remain so until further court action. It continues to be a live, active case or controversy not only with respect to the parties to the litigation, but continues to have an impact far beyond the current case. As a result there is still a viable issue for this Court to determine with respect to whether or not the preliminary injunction should have been entered as ordered by the District Court and as further expanded by the Fifth Circuit.

If this case were not reviewed now, then it would become clearly one which would be capable of repetition but evading review. Unless litigation and appeal were expedited to an extent that might not be possible, any future case might present facts that involve not only the expulsion being complete, but the student plaintiff having been graduated and no longer entitled to educational services. Even under such circumstances this Court could still review such a case under the rationale of *Roe v. Wade*, 410 US 113 (1973). See also, *Southern Pacific Terminal Company v. ICC*, 219 US 498 (1911).

But in the present case the *Roe v. Wade* rationale need not be invoked. There is still a case or controversy between the parties to this litigation. The injunction still has the effect of preventing the local official defendants from subjecting the plaintiffs to the school system's expulsion procedures while they are still in school or entitled to be in school. The present case is clearly not moot.

Wherefore this Court should grant certiorari to detemine whether or not the preliminary injunction should have been granted.

Respectfully submitted,

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